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In The

Supreme Court of the United States

October Term, 1989

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
UNION NO. 1149, RICK ANDERSON

Petitioners,

v.

SEAVIEW INDUSTRIES, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a grievance proceeding regulated by its collective bargaining agreement, does a union have an absolute privilege to maliciously make defamatory statements about a third party which is not a party to that collective bargaining agreement?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Petitioners: United Brotherhood of Carpenters and Joiners of America, Local 1149 and Rick Anderson (hereafter collectively "Union");

2. Respondent: Seaview Industries, Inc. (hereafter "Seaview").

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STATUTORY PROVISIONS INVOLVED

The relevant provision of the Labor Management Relations Act of 1947, 29 U.S.C. §185 (hereafter "§301"), relied upon by Union in its preemption argument is as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The relevant provision of the California Civil Code, §47(2), (3), relied upon by Union in its privilege argument is as follows:

> "A privileged publication or broadcast is one made . . .
>
> 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; . . .
>
> 3. In a communication, without malice, to a person interested, therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

JURISDICTION AND TIMELINESS

The jurisdiction of this Court in this matter is founded upon 28 U.S.C. §1257(3). The Petition for Writ of Certiorari was received by Counsel for Respondent Seaview on May 17, 1990. This Brief in Opposition to the Petition is timely filed on or before June 14, 1990 as provided in Rule 15.2 of the Rules of the Supreme Court of the United States.

STATEMENT OF FACTS

Seaview is a ship habitability subcontractor. Habitability work includes repairing and building living accommodations, such as galleys, heads and staterooms on board ships. In 1983, Seaview was one of six small companies in the San Francisco Bay Area which performed ship habitability repairs. Approximately 80% of the membership of Union were employees of these six companies.

Seaview was a member of a Collective Bargaining Agreement with Union which was to expire on December 31, 1983. By virtue of its entry into this agreement Seaview became obligated to make contributions to the Marine Carpenter's Pension Fund (hereafter "Fund") on behalf of its employees. In late 1983, Seaview and Union began negotiating for a new Collective Bargaining Agreement. After numerous discussions with Union, Seaview declared a bargaining impasse and announced that it intended to sever all relations with Union and Fund.

At or about this same time, Seaview entered into a Master Subcontract Agreement with one of the large shipyards in the San Francisco Bay Area, Southwest Marine of San Francisco (hereafter "Southwest Marine"). This Master Subcontract Agreement concerned work that was to be performed by Southwest Marine under an "AOR Phased Maintenance Program" on four U. S. Navy ships home-ported in the Bay Area. It was anticipated that this AOR Phased Maintenance Program would comprise most of the ship repair work the U.S. Navy would have performed in the Bay Area in the coming five year period. Private shipping companies had by this time ceased having habitability work performed in the Bay Area due to high labor costs and the threat of labor disruption. As a result, the habitability work under the AOR Phased Maintenance Program was going to be the only continuing source of habitability work available in the Bay Area during the next five years. Moreover, because of its entry into the Master Subcontract Agreement, Seaview was likely to perform all of this work.

After declaring its freedom from Union and Fund, Seaview continued to perform work on a limited basis. During this time Seaview paid all of its employees at least the prevailing wage rate, and some of them considerably more. Instead of paying contributions to Fund's health and welfare and pension plans, Seaview made direct cash payments to its employees of the same amounts it would have paid to Fund on behalf of these employees for these benefits.

On July 12, 1984, while Seaview was performing work on the first phase of the AOR Phased Maintenance

Program at Southwest Marine, Union called a strike. Seaview was able to finish this job despite difficult working conditions, threats, and actual instances of violence to its employees.

On July 26, 1984, Union filed a complaint against Seaview with the NLRB, alleging, among other things, that Seaview was not paying prevailing wage rates and conditions to its employees. The Regional Director of the NLRB concluded that, even though Seaview had made equivalent cash payments directly to its employees, it might still be obligated to make these same contributions to Fund because of its technical failure to properly terminate its contract. Even though it had already made these same payments directly to its employees, Seaview agreed to once again make them to Fund as proposed by the NLRB because it did not make economic sense to fight the issue. Thereafter, Seaview made arrangements for its carpenter employees to participate in its corporate retirement and health insurance plans. Both of these plans provided benefits to the employees which were equal to or better than those provided by the Fund.

On December 5, 1984, Seaview sent a letter to Union formally severing all contractual relations with Union and Fund. On December 13, 1984, Fund filed suit against Seaview in the United States District Court over the exact same issues that had been adjudicated and settled in the NLRB proceeding. Seaview moved for summary judgment claiming that Fund was collaterally estopped by the results of the prior NLRB proceeding. One day prior to the date scheduled for hearing of the motion, fund requested Seaview to stipulate to a dismissal of the action. The action was dismissed on March 25, 1986.

In February, 1986, Seaview was awarded the second portion of work under its Master Subcontract Agreement. Work on this $473,000 subcontract was scheduled to begin on April 14, 1986. On April 1, 1986, just six days after dismissal of Fund's District Court action, Union wrote the letter to Southwest Marine which is the subject of the complaint in this action. This letter was read by Ira Maybaum, the general manager of Southwest Marine, and others. Fearing not a mere grievance procedure as the letter suggested, but another strike such as that Union had called two years previously, Southwest Marine responded by cancelling its agreement to hire Seaview for any further work under the AOR Phased Maintenance Program, including the job then scheduled to start two weeks later.

The habitability work contemplated under the AOR Phased Maintenance Program had a total value of over $6,000,000. Based on the percentage of profits Seaview had made in the past on similar work, the estimated lost profits by Seaview as a result of the action of Union exceeded $2,000,000.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Union Has Made a Serious Misstatement of Fact

Union has alleged on page 6 of its petition,

> "It is also undisputed that this (the alleged defamatory letter) was published to no one other than Southwest Marine and the Pacific Coast

> Metal Trades District Council which is the multi-union party to the collective bargaining agreement."

This allegation was made for the first time by Union in its Petition for Rehearing to the California Court of Appeal. It was once again made in Union's Petition for Review to the California Supreme Court. On both occasions, Seaview has filed opposing briefs which have shown there is a dispute as to whom the defamatory letter was published. To reiterate, in Seaview's complaint filed in the San Francisco Superior Court it is stated that the "letter was seen and read by its addressee, Mr. Ira Maybaum, . . . and others . . . " (Record on Appeal, p. 4, ln. 16-18.)

Proof that the defamatory letter was published only to those with a legitimate interest in the grievance or arbitration proceeding is necessary to a claim of absolute privilege. *Hasten v. Phillips Petroleum Co.* (10th Cir. 1981) 640 F.2d 270, 274. It is understandable why Union would want to make such a claim. It is incomprehensible, however, that it should continue to do so when it is aware that a dispute exists on that point. While Seaview is reluctant to charge Union with intentionally attempting to mislead the Court, it feels this point must be made.

All of the cases cited by Union in support of an absolute privilege for defamatory statements made in the course of grievance proceedings contain the proviso that the statements must not have been disseminated beyond the proceeding, and in particular, to those who have no legitimate interest in the outcome of the proceeding. At the very least, the existence of a dispute about the persons or entities to whom the defamatory statements were

published requires trial, and prevents disposition of this litigation on a finding of absolute privilege.

Union Confuses the Two Separate and Distinct Doctrines of Preemption and Privilege

Union is confused about the relationship between the doctrines of preemption and privilege. All four of the cases that Union claims are in conflict with one another on these issues, namely *Linn v. Plant Guard Workers Local 114* (1966) 383 U.S. 53, *Old Dominion Branch No. 496 v. Austin* (1974) 418 U.S. 264, *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, and *Lingle v. Norge Division of Magic Chef* (1988) 486 U.S. ___, are in accord. All hold that §301 only preempts a state tort action where its resolution would require an interpretation of a collective bargaining agreement.

The California Court of Appeal, in addressing this issue, stated at page 10a of their opinion,

> "We conclude in any event that, under the applicable *Lingle* standard, the claims asserted were not federally preempted. The only issue here is whether the sender of the letter in question falsely and maliciously represented that appellant's business practices were other than they in fact were. To resolve that question, 'no interpretation of the collective-bargaining agreement is required' (*Rawson v. United Steelworkers of America, supra,* 770 P.2d at p. 797); and the union's acts are simply measured by state law. (Ibid.) In short, neither the reference by the union, in its allegedly libelous letter to Southwest Marine, to a conditional future intention to file a grievance under Article 23 of its collective bargaining agreement, nor the reference to prevailing wages and conditions under its 'Master

> Subcontract Agreement,' required 'interpretation' of the collective bargaining agreement on the state law issues of libel and interference with prospective economic advantage alleged in appellant's complaint. The disputes at issue here only tangentially involve reference to provisions of such agreement, involve a separate state law analysis that does not turn on the collective bargaining agreement, and accordingly are not preempted by federal law. (*Lingle v. Norge Div. of Magic Chef, Inc. supra* ___ U.S. at ___, ___, fn. 12 [108 S.Ct. at pp. 1882, 1885, fn. 12].)"

After identifying this "conflict," Union then proceeds to a discussion of how the circuit courts, district courts, and state courts have attempted to resolve this conflict by applying either an absolute or qualified privilege to statements made in grievance proceedings. Union is mistaken, however, in its characterization of their analysis. None of these courts attempt to resolve the issue of preemption with a discussion of privilege. Each of them treats privilege as a separate and distinct legal issue that has nothing to do with §301 preemption.

Of interest to Union is the fact that these various courts seem to apply different standards of privilege to these statements. Some have applied a standard of absolute privilege to statements made in grievance proceedings, while others have opted for a qualified privilege for such statements. Union proposes that creation of a uniform standard in this area through a decision in this case is reason for granting certiorari.

While creation of a uniform standard for treatment of these cases is an admirable pursuit, it cannot be attained through a decision in this case. The instant case does not fit the factual pattern of a single one of the cases cited by

Union. In each and every one of those 36 cases the victim of the alleged tortious conduct was an employee-party to a collective bargaining agreement. Seaview was not a party to Union's collective bargaining agreement.

In commenting on that issue, the California Court of Appeal stated in their opinion at pages 11a-12a,

> "However the union has not cited a case, nor has our own research discovered one, which extends this absolute privilege to actions by *third parties*, neither employees nor members of the union, who are subjected to tortious conduct in communications between parties to a collective bargaining agreement. The rationale which supports application of such an absolute privilege to the claims made by parties to the collective bargaining relationship does not support its extension to claims by third parties . . . The parties to a collective bargaining relationship may in some sense have assumed the risk of certain types of otherwise actionable tortious conduct against each other simply by virtue of their relationship. We do not see, however, why a third party should be charged with having assumed the risk that it will be injured by such tortious conduct.
>
> We believe that no absolute federal privilege applies to defeat such a third party's claim, and that instead only a qualified privilege under state law (Civ. Code, §47, subd. 3) is applicable."

The Opinion of The California Court of Appeal Will Not Restrict Unions and Employers From Resolving Disputes

Union claims on page 14 of its brief that,

"The opinion of the court below will have the effect of severely restricting unions and

> employers from forthrightly resolving disputes which arise under the terms of a collective bargaining agreement."

In fact, the Court of Appeal specifically addressed that issue when is stated, at page 13a of its opinion,

> "We emphasize we in no way detract from those precedents which hold that the parties to a collective bargaining relationship may not pursue each other in court over statements made in grievance proceedings. We simply hold that the parties to those proceedings have only a qualified, not an absolute, privilege as to claims made by third parties; and that those grievance proceedings may not be used with absolute immunity to perpetrate malicious attacks on third parties."

Seaview submits that the decision below will not restrict unions and employers from resolving their disputes with one another. The ruling is designed to and should prevent either union, employee or employer from using grievance procedures for the purpose of maliciously attacking innocent third parties who are not a part of that procedure. Such a result is entirely consistent with this Court's prior ruling in *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 212, in which it stated,

> "In extending the pre-emptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

The Decision in *Rawson* Will Not Dispose of the Issue Presented by This Petition

Union's claim that the question presented in *Rawson v. United Steelworkers of America* (1988) 770 P.2d 794, cert.

granted, ___ U.S. ___, No. 89-322, is one that might dispose of the issues presented in this petition is misguided. *Rawson* is a state law negligence case filed by the survivors of several union members against the decedents' union. The issue involved is whether the union, in conducting a safety inspection of a mine where a fatal accident took place, had assumed a duty of care toward its members which exceeded those created by the collective bargaining agreement.

The duties of the union towards its members, normally called "fair representation," are defined in the collective bargaining agreement. To decide whether the union had assumed additional duties of care towards its members, possibly required interpretation of the terms of the collective bargaining agreement. No such interpretation is either necessary or possible in the instant case because Seaview is not a member of a collective bargaining agreement with Union. Thus *Rawson*, like all of the other cases cited by Union, is inapplicable to the decision in the instant case. It involves members of a collective bargaining agreement suing each other rather than an independent third party suing a member of a collective bargaining agreement.

CONCLUSION

For all of the reasons set forth herein and based upon all of the foregoing authorities, it is respectfully requested that this Court deny Union's Petition for Writ of Certiorari.

Dated: June 7, 1990

Respectfully submitted,

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